Supreme Court, U.S.
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NO. 931865

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICKEY JENKINS,
Petitioner

versus

STATE OF INDIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Trial Court's error in refusing to permit the Defendant to present past habitual sexual practices of the victim as exculpatory evidence violates the Defendant's rights under the Compulsory Process Clause and the Confrontation Clause of the Sixth Amendment.

II. Whether the Trial Court's error in applying the Indiana Rape Shield Statute I.C. 35-37-4-4 to a deceased victim violated the Due Process Clause of the Fourteenth Amendment and the 6th Amendment Right of Cross-Examination.

III. Whether the Trial Court permitting the FBI Supervisor to testify concerning D.N.A. test results, without requiring antecedent testimony of the Technician who actually preformed the test, violated defendant's Constitutional right of

Confrontation and Cross-Examination of the Sixth Amendment.

IV. Whether the Trial Court's error in allowing the introduction of the Defendant's statements after he had informed the police that he no longer wished to speak with them violated the Defendant's Fifth Amendment Right against Self-Incrimination.

LIST OF PARTIES TO PROCEEDINGS

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Citation to Official Decision of the Indiana Supreme Court:

627 N.E.2d 789

Citation to Official Decision of the Indiana Supreme Court denying Petition for Re-Hearing:

627 N.E.2d 789

JURISDICTIONAL GROUNDS FOR WRIT OF CERTIORARI

Date of entry of decision of the Indiana Supreme Court:

December 20, 1993

Date of Entry of Denial of Petition for Re-Hearing:

March 1, 1994

Statutory Provision granting authority to review:

28 U.S.C. § 1257

VERBATIM RECITATION OF PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

I.C. 35-37-4-4

(verbatim reproduction contained in Appendix)

United States Constitution, Amendment V

(verbatim reproduction contained in Appendix)

United States Constitution, Amendment VI

(verbatim reproduction contained in Appendix)

United States Constitution, Amendment XIV

(verbatim reproduction contained in Appendix)

STATEMENT OF THE CASE

On September 16, 1991, the body of a young lady was found in a ditch in northern Morgan County. (R. 2906). Numerous injuries were apparent on the victim, and there was blood, hair and a tire track in the gravel roadway. (R. 2906-2910, 2913). Upon raising the shirt of the victim, a bruise in the form of a tire track was observed across the abdomen of the victim. (R. 2918).

After a news broadcast from the scene describing the young lady, the young lady was tentatively identified as Jennie Whitman via a telephone call from her mother, Caroline Whitman. (R. 2929). Detectives Lang and Betts went to the home of the victim in Indianapolis, and interviewed the mother. (R. 2932). The

mother indicated that she had not seen her daughter since the preceding evening. (R. 2933). Caroline Whitman indicated that the victim had fled from her car, and that she assumed that she had gone to see the Defendant and his girlfriend, Alene Kingery since she had indicated a desire to speak with them without Caroline being present. (R. 2935).

Caroline further indicated that a number of telephone calls had occurred during the early morning hours with the defendant concerning her daughter. (R. 2936). In one of the conversations, Caroline indicated that the Defendant had said that he had dropped the victim off at Starvin Marvin, a gas station near the victim's home. (R. 2940).

The Detectives then went to the Defendant's home to interview the Defendant

and Alene Kingery. (R. 2956). During this interview, the Alene indicated that the victim had arrived at her home at approximately 9:30 P.M. and that she and the defendant had dropped the victim off at the Starvin Marvin at approximately 10:30. (R. 2960-2962). Alene further stated that she, the defendant, and Caroline had searched for the victim for a number of hours on the preceding evening and early morning. (R. 2967).

The Detectives then interviewed the Defendant. (R. 2971). The defendant told a story similar to that of Alene. (R. 2972-2976). Detective Lang then inspected the Defendant's vehicle to see if the tire tread matched the bruising that he had observed on the body of the victim. (R. 2981). Upon looking at the car, he observed a reddish substance on the left

rocker panel of the car which he believed to be blood. (R. 2982).

Defendant was then advised of his Miranda rights. (R. 2983). The officers then believed the Defendant to be a suspect. (R. 2984). The defendant consented to a search of his car. (R. 2986). Detective Lang then left the car to speak with the Prosecutor, and at that point the defendant was handcuffed. (R. 2989). While Detective Lang was on the telephone, the defendant indicated to Detective Betts that he no longer wished to talk to the police. (R. 2996).

In the presence of the Defendant, the detectives negotiated a consent to search the home with Alene and her mother. (R.3001). The defendant first objected to the search, but after the police were able to secure permission from Alene and her

mother, he was persuaded to consent. (R. 3001-3003). The search netted a pair of tennis shoes, a baseball cap, and clothes. (R. 3002-3005).

The officers then went to interview additional witnesses with the defendant in the back seat of the car. (R. 3008, 3023). The officers and the defendant had a conversations on a variety of subjects. (R. 3025). Detective Lang finally requested the defendant to decide if he still wished to no longer talk with them. (R. 3026). The defendant then agreed to talk to the police. (R. 3026). The defendant was not re-Mirandized. (R. 3026). The officers then questioned the Defendant about the blood on the car. (R. 3028). The defendant indicated that he believed that the blood had come from when the victim had been helping him fix his car

on the preceding Saturday. (R. 3028).

While investigating an unrelated automobile personal injury accident, the defendant was handcuffed. (R. 3043). The defendant was then transported to the Morgan County Jail where two taped statements were taken from the defendant. (R. 3046-3048).

In interviewing additional witness, the officers learned that the victim had engaged in sexual relationships approximately 72 hours before her death with her boyfriend, Charles Mathews. (R. 3339).

On September 17, 1991, the Court granted a Search Warrant for the defendant's vehicle (R. 6219), and for the defendant's person. (R. 586).

Defendant filed his Offer to Prove Pursuant to I.C. 35-37-4-4, (Appendix p.47-

49) Brief in Support, (Appendix p. 50-71), (see also, Brief of Appellant, Sections V through IX); along with the deposition of Charles Mathews. (R. 832, 1010); (Appendix p. 75). The court, after hearing excluded all evidence of past sexual relationships of the victim except for the specific instance with Mathews which occurred on Thursday. (R. 706); (Appendix p. 72-74).

On February 25, 1992, defendant filed his Motion to Suppress DNA evidence claiming that introduction of the evidence would violated his rights of confrontation and cross-examination. (R. 702A, 4249-4250); (Appendix p. 76-78). The State admitted that the F.B.I. refused to make its technician, who conducted all of the steps of the DNA testing procedure except for the analysis of the results, available to testify at trial. (R. 4254-4255). The

court, after hearing, denied defendant's Motion. (R. 4403); (Appendix p. 79-81); (see also, Brief of Appellant, Sections I through IV).

On March 30, 1992, the trial began. (R. 7). At trial, the State offered the tape statements of the defendant. (R. 8083, 8175). The defendant objected to their introduction on Fifth Amendment grounds. (R. 10390-10391); (Appendix p. 82-83); (see also, Brief of Appellant, Section X). The court, after a hearing out of the presence of the jury admitted the tapes over the objection of the defendant. (R. 8083, 8187); (Appendix p. 82).

During trial the defendant sought to produce evidence of past sexual activity of the victim as exculpatory evidence. (R. 7896-7898). The court refused to admit the testimony. (R. 7898).

During trial, the State offered results of DNA tests. (R. 8672). Defendant objected to such results on the grounds that the failure of the State to present the technician who had conducted the tests violated defendant's rights of confrontation and cross-examination. (R. 8579). The court denied defendant's objections. (R. 8592).

During trial, defendant presented two expert witnesses which disputed the reliability of the DNA testing results (R. 9528-9583, 9190-9271). along with the National Academy of Sciences Report which was critical of the methodology employed by the FBI. (R. 9817-9930). Dr. Mueller testified as to the great controversy in the scientific community on the issue of population genetics. (R. 9873-9883, 9132, 8980). He further testified as to a

potential 2% false positive rate in the DNA testing procedure. (R. 9570).

Dr. Randall Libby testified as to potential errors which could have been made by the technician that the supervisor would not be able to detect after the fact. (R. 9432, 9434-9435). He further testified as to a potential error in the Q-6 semen sample in this case which could only be refuted by the technician who conducted the test. (R. 9526-9527).

At the conclusion of the trial, the jury found the defendant guilty on all counts. (R. 10123). The court then conducted a Habitual Criminal Trial, and the jury found the defendant guilty of being a habitual criminal. (R. 10321).

At sentencing, the court sentenced the defendant on Count I, Murder to a term of sixty (60) years, enhanced by a thirty (30)

year term for being a habitual criminal. (R. 10-11). This term was consecutive to Count IV, Rape, upon which the defendant was given a twenty (20) year term. (R. 10-11).

ARGUMENT

I. WHETHER THE TRIAL COURT'S ERROR IN REFUSING TO PERMIT THE DEFENDANT TO PRESENT PAST HABITUAL SEXUAL PRACTICES OF THE VICTIM AS EXCULPATORY EVIDENCE VIOLATES DEFENDANT'S RIGHTS UNDER THE COMPULSORY PROCESS CLAUSE AND THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

In this case the defendant sought to introduce evidence that the victim often engaged in consensual sexual activity while partially clothed. (R. 7896-7997). The deposition of Charles Mathews, Exhibit 408, was proffered under I. C. 35-37-4-4 and included his testimony that the victim often had sex while partially or fully clothed. (R. 7950).

It is important to note that the case against the defendant on the charges of Rape and Child Molesting is entirely circumstantial. One of the cornerstones of the state's case on these charges was succinctly stated by the Prosecutor during Final Argument:

> There was no reason for Jennie Whitman's clothes to be the way they were unless, of course, it was forced. (R. 9995). see also R. 7896-7897.

In making such a statement, the State was inviting the jury to make a false assumption; that the victim would not engage in consensual sexual activity unless she disrobed. This was not in fact the case. The only evidence before the court, which the defendant sought to introduce to rebut the erroneous inference, was that the victim did in fact engage in consensual sexual activity while partially clothed.

(R. 7950). To allow the State to invite a false conclusion, and then to allow the State to hide behind the Rape Shield Statute is particularly problematic.

Failure to allow such evidence limited the defendant's rights to present exculpatory evidence. "The history of the accused's right to present a defense, including the right to introduce evidence, 'is the story of the development of the adversary process and the demise of the inquisitorial method." J. Imwinkelried, Exculpatory Evidence, 407 (1990) (citing to Westen, The Compulsory Process Clause 73 Mich. L. Rev 71, 177 (1974). Additionally, the United States Supreme Court has held that the Fourteenth Amendment guarantees of Due Process incorporates the Compulsory Process guarantees of the Sixth Amendment. Washington v. Texas, 388 U.S. 14, 87 S.Ct.

1920, 18 L.Ed.2d. 1019, (1967). In writing for the Court in that decision, Chief Justice Warren further asserted that an accused has a constitutional right to present witnesses to establish a defense, as a part of his compulsory process guarantee. Id. at 19.

The doctrine set forth in Washington, Id., was extended to technically inadmissable hearsay evidence in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d. 297 (1973), when the Court found that although the proffered evidence sought to be admitted did not fit within the state's hearsay doctrine, the testimony was so reliable and crucial that it's exclusion violated the principles of Washington. Further, it found that the right precluded trial judges from mechanistically applying evidentiary rules

to preclude reliable, and vitally necessary defense evidence. Id. at 302-303; see e.g., Rock v. Arkansas, 483 U.S. 44, 97 S.Ct. 37, 107 L.Ed.2d. 2704, (1987).

Although in Washington, 388 U.S. 44, 87 S.Ct. 1920, 18 L.Ed.2d. 1019, (1967), the Court relied on the compulsory process clause as a source for the accused's constitutional right to present evidence, the Court has also used the confrontation clause to support that right. In Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d. 347, (1974), the issue related to evidence of a witness' past juvenile record, something which was considered confidential by state statute. The defendant sought to admit this evidence so show possible bias on the part of the witness. While the Court conceded that the State's interest in maintaining the

confidentiality of juvenile proceedings was legitimate and important, on the facts of the case, the Court concluded that exclusion of the evidence violated the accused's confrontation right, which was paramount, despite the state's lawful interest.

Davis, Id., was reaffirmed by the Court when it decided Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L.Ed.2d. 513, (1988). In Olden, the defense sought to admit evidence supporting its theory that the white complaining witness had fabricated a rape charge against the black defendant to protect her romantic interest with another black man. At trial the evidence had been excluded because of the risk that the jury would improperly reject her testimony because of bias about interracial relationships. The Court found

that exclusion of this testimony was constitutional error, citing to Davis, 415 U.S. 308. Olden, 488 U.S. at 231 .

In Commonwealth v. Appenzeller, 44 Crim. L. Rep. (BNA) 2161 (Pa. Super. Ct., Nov. 2, 1988), withdrawn Jan. 17, 1989, but see, Commonwealth v. Appenzeller, 46 Crim. L. Rep. (BNA) 1104 (Pa. Super. Ct., en banc, Oct. 16, 1989), the court did find that the accused's confrontation right prevailed over the rape shield proscriptions. The court made its decision by finding that the accused's constitutional right to introduce evidence of the young complainant's sexual activity to dispel any improper inference by the jury about her knowledge of sexual matters, was warranted.

Similarly, in State v. Pulizzano, (1988), 148 Wis. 2d 190, 434 N.W.2d 807,

the court utilized Davis, 415 U.S. 308, and accepted the defense argument for admission of this type of evidence, after balancing the policy supporting the Rape Shield Law against the defendant's need for the evidence. Pulizzano, 434 N.W.2d at 812. The court found that the accused should be permitted to conduct "limited inquiry into the prior sexual assault for the purpose of negating the inference that M.D.'s sexual knowledge was gained from the alleged assault by Pulizzano." Id. at 812, in spite of the proscriptions of a Rape Shield Law which were very similar to those of Indiana.

A New Hampshire court ruled in accord with Wisconsin, in State v. Howard, (1981), 121 N.H. 53, 426 A.2d 457, a case involving statutory rape, when it found that the defendant's confrontation right precluded

that judge from automatically barring defense evidence of the sexual knowledge of the complaining witness. In reaching it's decision, the court noted that average jurors would probably assume that a twelve year old girl was sexually innocent, and therefore it was probable that they would believe that unless the offense charged occurred, she would not have this knowledge. Id. at 462.

A similar holding was also made by the court in State v. Jacques, (1989), Me., 558 A.2d 706, where the court noted that the Rape Shield Law and the policy underlying it "must be weighed against the defendant's constitutional right of effective cross examination and to present a proper defense". Id. at 707. The court additionally concluded that it was a matter of constitutional right that "[a]

defendant. . . must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually that she could not have fabricated the charge". Id. Furthermore, the court added that "[a] number of jurisdictions have recognized the accused's constitutional right to surmount Rape Shield Law "for the limited purpose of rebutting the jury's natural assumption concerning a child's sexual innocence. . . ". Id.

Finally, the 7th Circuit Court of Appeal recently ruled that the Indiana Rape Shield Statute unconstitutionally violated a defendant's right to present exculpatory evidence in the case of Tague v. Richards, 3 F.2d 1133, (1993). This is the exact same argument presented in this case.

The evidence offered was highly reliable in that the evidence came from the

boyfriend of the victim, a witness adverse to the defendant. Failure of the court to allow the defendant to present exculpatory evidence of this nature violated defendant's constitutional rights, requiring a reversal of his convictions.

II. WHETHER THE TRIAL COURT'S ERROR IN APPLYING THE INDIANA RAPE SHIELD STATUTE TO A DECEASED VICTIM VIOLATES THE DEFENDANT'S DUE PROCESS RIGHTS OF THE FOURTEENTH AMENDMENT AND THE CROSS-EXAMINATION RIGHTS OF THE SIXTH AMENDMENT.

In this case, the defendant sought to present evidence of the past sexual history of the victim to rebut the inference that the state of the victim's clothes would be inconsistent with consensual sexual relations. (R. 7896-7898). The Trial Court

ruled such evidence inadmissable. (R. 7898).

Not allowing the defendant the right to present evidence of this nature is particularly troublesome where the exclusion of such evidence is not violative of the underlying premise of the Rape Shield Statute; the protection of the victim while testifying, of embarrassment or harassment, or the fear that the introduction of such evidence would reduce the likelihood that the victim would report such an offense. Stephens v. Morris, 756 F.Supp 1137, (N.D. Ind., 1991). Absent a reasonable rationale for excluding what was extremely probative evidence which tended to rebut an erroneous conclusion, there was no good reason for excluding the evidence. In addition, the refusal to allow this evidence violates the doctrine set down in

ruling precedents of the U. S. Supreme Court which prohibits the barring of relevant, reliable defense evidence under the rubric of technical evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d. 297, (1973).

In Chambers, this court stated:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Chambers at 295.

The right to confront and cross-examine is not absolute and may bow. in the proper case, to other legitimate interests in the criminal trial procedure. Berger v. California, 393 U. S. 314, 89 S. Ct. 540, 21 L. Ed. 508, (1969); Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d.

666, (1990).

However, the denial or significant diminution of this right undermines the integrity of the fact finding processes and requires a close examination of the compelling state interest. Berger v. California; Chambers v. Mississippi.

In this case, there is no compelling state interest to be served in the exclusion of this evidence where the victim is deceased. Not allowing the defendant to present such evidence to rebut an incorrect inference, where there is no countervailing reason to the contrary, violated the Defendant's Due Process Rights of the Fourteenth Amendment and Cross-Examination Rights of the Sixth Amendment.

III. WHETHER THE TRIAL COURT ERROR PERMITTING THE F.B.I. SUPERVISOR TO TESTIFY

CONCERNING DNA TEST RESULTS, WITHOUT REQUIRING ANTECEDENT TESTIMONY OF THE TECHNICIAN WHO ACTUALLY PREFORMED THE TEST, VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT OF CONFRONTATION AND CROSS-EXAMINATION GUARANTEED BY THE SIXTH AMENDMENT.

Amendment VI of the U. S. Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him;

The State's failure to present the technician who performed the "hands on" portion of the DNA testing procedure, denied the defendant the right to confront and cross-examine the adverse witness as to the exact methodology used in conducting the tests. The evidence before the court was that the DNA analysis was conducted by

a two person team at the F.B.I. (R. 8724-8735). Technician Rich Deeter, who was not called to testify conducted Sections I-XIV of the protocol, which consisted of the actual manipulation of the samples themselves to produce the autorads. (R. 8724-8735). Supervisory Agent Robert Coffin, who was called as a witness by the State conducted Section XV of the protocol which is a statistical analysis of the DNA testing procedure which was done by Deeter. (R. 8724-8735).

This Court has observed that, " the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012 at 1016, 108 S.Ct 2798 at 2800, 101 L.Ed. 857, (1988). This Court has previously visited the question of the degree to which the

Confrontation Clause requires direct, face-to-face confrontation of a witness. Maryland v. Craig, supra. The right of confrontation:

> (1) insures that the witness will give his statements under oath - thus impressing upon him the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal invention ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Green v. California, 399 U.S.149 at 158, 90 S.Ct. 1930 at 1935, 26 L.Ed.2d 489, (1970).

In this case, the Defendant presented evidence that an error by Mr. Deeter may have occurred during the testing procedure with the critical Q6 female specimen. Any number of potential errors might have been committed by Mr. Deeter resulting in the

anomalous Q6 female result. Only Mr. Deeter could be adequately confronted and cross-examined about this test since only he would have knowledge of the exact procedure employed by his in this case, and the likelihood that an error consistent with the Q6 result had occurred.

The State presented no compelling interest in failing to present Mr. Deeter making the rights of the Defendant to adequate confrontation and cross-examination bow to legitimate necessity of the criminal trial procedure. Maryland v. Craig, 110 S. Ct at 3166.

Failure to present the technician who performed the tests deprived the defendant of his rights to confront and cross-examine adverse witnesses, as provided by the State and Federal Constitutions. As such, the court was in error in allowing such

testimony into evidence requiring a reversal on all counts.

IV. WHETHER THE TRIAL COURT'S ERROR IN ALLOWING THE INTRODUCTION OF THE DEFENDANT'S STATEMENT AFTER HE HAD INFORMED THE POLICE THAT HE NO LONGER WISHED TO SPEAK WITH THEM VIOLATED THE DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

Early on in the questioning process, the defendant informed police that he no longer wished to answer any further questions. (R. 6495). A variety of conversations, nevertheless, occurred after the request by the defendant that he no longer wished to talk. All of these conversations and questions with Officers Lang and Betts occurred without them re-

Mirandizing the defendant. (R. 6505-6506).

Several hours thereafter, the defendant was taken to the County Jail at which time taped statements were taken from the defendant after new Miranda warnings. (R. 6505-6506). These statements (exhibits 126 and 128) were played to the jury over defendant's objection. (R. 8083, 8187).

At the time of the original request by the defendant to cease questioning, the defendant was placed in the back of the police car. (R. 6452). He was then transported by the police officers as they made the rounds of their investigation and was asked various questions by the police officers. (R. 6470-6476, 6486). At some time during the process, the conflicting evidence was that the defendant was placed in handcuffs when the officers had to investigate an unrelated traffic accident.

(R. 6487).

In this case, the defendant informed the police that he no longer wished to talk to them. (R. 6495). Shortly thereafter the police were able to persuade him to consent to a search of his residence, (R. 6504-6505) and thereafter were able to get two tape recordings after new Miranda warnings. (R. 6505-6506). These statements (exhibits 126 and 128) were played to the jury over the objection of the defendant. (R. 8083, 8187).

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, (1966),

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to of during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of

compulsion, subtle or otherwise.

Miranda, 384 U.S. at 473.

The extent to which the right continues is judged upon a standard of whether his exercise of the right has been "scrupulously honored". A simple review of the actions of the officers in this case shows that they, by subtrafuge, indirect coercion, and questioning, were able to convince the defendant to allow them to resume questioning. These actions do not rise to the level of a "scrupulously honored" right making the introduction of the statements a violation of Defendant's Fifth Amendment rights.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests this Court to grant Certiorari to decide the important

Federal Questions presented, and to clarify conflicting decisions of the lower courts.

Respectfully submitted,

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Supreme Court, U.S.
FILED

~~931865~~ MAY 23 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICKY JENKINS,

Petitioner

versus

STATE OF INDIANA

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

SUPREME COURT OF INDIANA

55S00-9207-CR602

RICKEY JENKINS, APPELLANT

V.

STATE OF INDIANA, APPELLEE

DECEMBER 20, 1993

RE-HEARING DENIED MARCH 1, 1994

GIVEN, Justice.

Appellant was tried by jury and convicted of one county of Murder, two counts of Felony Murder, one count of Rape, one count of Child Molesting, and was found to be a habitual offender. He was sentenced to a term of sixty (60) years on the murder conviction, which was enhanced

by thirty (30) years due to the habitual offender finding. Appellant received a twenty (20) year consecutive sentence for the rape of the victim.

The facts are: On September 14, 1991, Jeanie Whitman, the 15-year-old victim in this case, and her friend, Michael Cloud, went to appellant's home. They rode with him when he took Delores McGarr home. Prior to leaving, appellant took Jeanie aside and said something to her. After that exchange, Jeanie told Aline Kingery, appellant's girlfriend, that her boyfriend was weird. During the trip, appellant allowed both Cloud and Jeanie to drive his car. Appellant suggested that Jeanie sit in his lap while Cloud drove the car. Jeanie initially refused but eventually complied with the request. When Cloud was driving, he turned around and saw

appellant's hand on Jeanie's thigh.

On September 15, 1991, Jeanie spoke with her mother and insisted that she needed to go to appellant's home to tell Kingery something which she could not tell her mother. When Jeanie arrived at appellant's home, appellant and Kingery were preparing for bed. Jeanie left with her mother because she did not have the opportunity to speak privately with Kingery. Jeanie and her mother argued when Jeanie returned to the car. Jeanie then exited the car and returned to appellant's home.

After she arrived at their house, Jeanie tried to get appellant and Kingery to take her for a ride in their car. They refused to do so because it was late in the evening. Jeanie offered to buy a two-liter bottle of Pepsi for them if they would take

her home. At approximately 10:30 p.m., appellant agreed to give her a ride. They left without Kingery. Appellant returned to his home at approximately 12:00 to 12:30 a.m. and told Kingery that he had car trouble after dropping Jeanie off near her home. He also told Kingery to say that she had gone with him when he took Jeanie home. Kingery initially told that story due to threats made by appellant. However, when she realized that appellant had lied to her, and faced with the inconsistencies in their stories, she ultimately told the truth.

The next morning, the victim's body was found on the side of a gravel road in rural Morgan County. An autopsy found the cause of death to be a depressed skull fracture. Great force was required to inflict these wounds. There was a bruising

pattern across the victim's chest and arm that appeared to be a tire tread pattern. Her injuries were consistent with being run over by a car. The results of the autopsy also revealed conditions consistent with sexual assault.

F.B.I. Special Agent Robert Coffin, a supervisor in the DNA Analysis Unit, testified about how the F.B.I. conducts its DNA testing. He explained that Rick Deeter, a trained lab technician, worked with him in conducting the tests in this case. Deeter performed the actual manipulation of the samples. Coffin conducted the statistical analysis of the DNA testing procedure which was done by Deeter.

Coffin testified that the results of the DNA testing showed that the semen on the victim's underwear was consistent with

that of appellant, but not with that of her boyfriend. He testified that one of the blood samples from appellant's car was consistent with the victim's blood, but not that of the appellant.

Appellant argues that he was denied the right to confront witnesses testifying against him because the lab technician did not testify at trial. He claims that he was unable to cross-examine Deeter regarding the methods used in the "hands on" portion of the testing.

Every defendant has the right to be confronted by his accusers and by witnesses who will testify against him and has the right to cross-examine them. Denson v. State (1960), 240 Ind. 324, 163 N.E.2d 749. However, the right of confrontation is not absolute and must occasionally give way to considerations of public policy and

necessities of the case. Miller v. State (1987), Ind., 517 N.E.2d 64. The failure of the State to call a competent witness does not deny a defendant his constitutional right. Beverly v. State (1989), Ind., 543 N.E.2d 1111. The State cannot be compelled to call witnesses at the instance of the accused. Id. Appellant has the burden of seeing that witnesses who may have aided in his defense are called. Id.

In Reardon v. Manson (2nd Cir. 1986), 806 F.2d 39, cert. denied, 481 U.S. 1020, 107 S.Ct. 1903, 95 L.Ed.2d 509, the State called the supervisor of the toxicology laboratory to testify, but did not call the alb technician. Although the scientific data in that case did not involve DNA testing, the procedure was similar. The technician manipulated the samples under

the supervisor's direction and followed the established protocols. A similar challenge was made in that case.

The court pointed out that only one of the testing procedures required a subjective evaluation by the technician. The other testing procedures were mechanically objective. The supervisor then drew his own conclusions regarding the testing information. The Court further noted that it was unlikely that a technician would have any independent recollection of the tests conducted by him. He likely would have to refresh his recollection by use of the laboratory notes which he made. These notes were used by the supervisor not only in reaching his conclusion but at trial during his testimony. The testimony from the technician would amount to generalizations

concerning laboratory practices and probabilities concerning the likelihood of error. The Court concluded that there would be little use in making the technician available for cross-examination.

In the case at bar, we find the failure of the State to call the technician to testify at appellant's trial did not violate his right to confront witnesses testifying against him.

Appellant does not contest the chain of custody of the samples prior to the technician's possession. He does, however, challenge the chain of custody within the F.B.I. laboratory. He contends the absence of testimony by the technician constitutes a break in the chain of custody and that the technician's failure to testify deprived him of the opportunity to challenge the F.B.I. testing procedures.

The party offering the challenged evidence need only provide "reasonable assurance" that the evidence passed through various hands in an undisturbed condition. Kennedy v. State (1991), Ind., 578 N.E.2d 633. The proponent need only provide evidence that "strongly suggests" the exact whereabouts of the evidence at all times. Id. When appellant challenges the chain of custody, he must present evidence which does more than raise "a mere possibility" that the evidence was tampered with, altered, or substituted. Id. Therefore, a prefect chain of custody need not be established by the State. Id. Any gaps in the chain go to the weight given to the evidence and no to the admissability of the evidence. Id.

Federal Rule of Evidence 901(a) provides that:

"the requirement of authentication or identification as a condition precedent to admissability is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Appellant does not claim that someone in the F.B.I. laboratory tampered with, altered, or caused a substitution in the samples in the case at bar. He argues that there was a mistake made by the technician during the testing of the samples. He produced two experts regarding the possibility of mistakes in the testing procedure. He claims this testimony satisfies the necessary showing of tampering with the evidence, thereby rendering the evidence inadmissible.

If was for the trier of fact to determine how much weight to give the

testing evidence in light of appellant's expert testimony regarding the alleged error. Tiller v. State (1989), Ind. 541 N.E.2d 885. Moreover, it is the role of the trier of fact to resolve conflicts in testimony. Williams v. State (1982), Ind., 439 N.E.2d 1142. On appeal we will not reweigh the evidence not will be reassess the credibility of witnesses. Braswell v. State (1990), Ind., 550 N.E.2d 1280.

We have held that there is a presumption that public officials discharge their duties with due care. Kennedy, supra. Moreover, we have held that there is a presumption of regularity in the handling of exhibits by public officers. Id. We have also held that whether the actual techniques involved were followed goes to the weight given to the evidence and not to the admissibility of that

evidence. Davidson v. State (1991), Ind., 580 N.E.2d 238.

The State called the supervisor to testify and the technician's notes were admitted in evidence under the business record exception to the hearsay rule. Appellant claims that the notes do not fall under this exception.

Assuming for the sake of argument that the laboratory notes do not fall under the business record exception to the hearsay rule, no error occurred here. An expert is allowed to base his opinion on facts or data that are not admissible in evidence if they are the type reasonably relied upon by experts in the field. McElroy v. State (1992), Ind. App., 592 N.E.2d 726, Trans. Denied; see Ind. Rules of Evidence, Rule 703. The notes are made by a technician who follows established protocols during

the testing procedure. Laboratory notes of that kind are used by every supervisor involved in DNA testing. Therefore, although the laboratory notes might have been inadmissible hearsay, admission in the present case in harmless because of use by the expert witness.

Appellant contends the trial court erred in its interpretation of the term "results" as used in Ind.Code § 35-37-4-13. He argues that the trial court should have required expert testimony prior to allowing the statistical analysis of the results in evidence.

The statute provides:

"(a) As used in this section, "forensic DNA analysis" means an identification process in which the unique genetic code of an individual that is carried by the individual's

deoxyribonucleic acid (DNA) is compared to genetic codes in DNA found in bodily substance samples obtained by a law enforcement agency in the exercise of the law enforcement agency's investigative function.

(b) In a criminal trial or hearing, the results of forensic DNA analysis are admissible in evidence without antecedent expert testimony that forensic DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material."

Appellant argues that Special Agent Coffin should not have been allowed to testify to the statistical probability of a coincidental match. He claims "The Product Rule," which was used by the FBI in this case, is not generally accepted within the scientific community. The defense

presented reports and testimony by experts who challenged the accuracy of this quantitative evidence. Appellant cites the case of Commonwealth v. Curnin (1991), 409 Mass. 218, 565 N.E.2d 440. The convictions in that case were reversed on appeal based upon the lack of evidence showing general acceptance or inherent rationality of the quantitative analysis.

In Martin v. State (1984), Ind., 464 N.E.2d 896, 900-01, we stated:

"There are doubtless many formulas and principles which experts use . . . to arrive at their ultimate opinions. The determination of which factors, formulas or calculations are necessary, either singly or in conjunction with one another, to form an expert opinion is within the knowledge and judgement of the expert and, again, is a subject which can be approached and

examined in cross-examination or by bring forward other expert witnesses."
Appellant did precisely that in the case at bar. The trial court did not err in the admission of this evidence.

Appellant claims that the trial court erred by allowing serology test results in evidence. He claims the deviations from protocol which occurred were of such a nature that the testing procedure as it was actually conducted was an entirely different test. He argues that the results should not have been admitted absent a showing that the new testing procedure was generally accepted within the scientific community.

Paul Misner, an Indiana State Police Serologist, performed the serology tests. He testified that he had the authority to modify existing procedures to suit the

needs of the laboratory. Defense counsel challenged the deviations from laboratory protocols which occurred during the testing. Misner testified that in each instance the deviations would not affect the test results.

The deviations from protocol were discussed fully in the presence of the jury during cross-examination. Conflicting opinions between experts as to the validity of the testing procedures should be brought out during cross-examination. Orr v. State (1984), Ind. App., 472 N.E.2d 627. The final analysis is left in the hands of the jury. Id. There was no error in the admission of this testimony.

Appellant claims the trial court erred in applying the Rape Shield Statute, Ind.Code §35-37-4-4, et. seq. He claims the statute should not apply when the

victim is deceased. The trial court allowed testimony from the victim's boyfriend regarding his sexual activity with the victim two days prior to the murder. Appellant claims that application of the statute to the present case was prejudicial in that he was prevented from introducing evidence to explain other sources of the semen and that the victim's state of dress might be consistent with consensual intercourse.

Appellant's argument fails for several reasons. First, appellant was allowed to question Charles Matthews, the victim's boyfriend, about their sexual activity immediately prior to the occurrence of the crimes. Secondly, the Rape Shield Statute specifically prohibits introduction of evidence of the victim's sexual activity with other persons. Appellant was

attempting to show, although there was no evidence of prior consensual activity between the victim and the appellant, that when the victim engaged in any consensual sexual activity she frequently did so while partially clothed. The inference he hoped to leave with the jury was that her state of dress indicated consent, rather than the use of force.

The trial court correctly applied the Rape Shield Statute in the present case. The statute makes no exception in the victim is deceased. Appellant is correct that one of the purposes of the statute is to protect living victims and their families from the embarrassment of public discussion of the victim's prior sexual activity. The goal is to promote reporting of crime. If the statute is not applied to victims who ultimately are murdered, then

perpetrators of sex crimes will be encouraged to kill their victims, thus enabling them to defend the charges through exploitation of evidence of the victim's prior sexual activity.

Moreover, appellant was able to present evidence of the victim's sexual activity two days prior to the murder. Therefore, he was not prejudiced by the trial courts decision. Any further discussion of the victim's sexual activity would have been irrelevant and prejudicial. The trial court did not err.

Appellant argues that he has denied the opportunity to present evidence to support his theory that someone else committed the rape. He claims that evidence of the victim's prior sexual activity would have helped his defense and would have been admissible under Ind.Code

§35-37-4-4(b).

However, as stated above, the cnly activity which would be relevant to the charges against appellant involved the sexual activity two days prior to the murder. The trial court allowed this into evidence. Identity of the perpetrator wa an issue. The State brought in DNA evidence identifying appellant as the perpetrator. The trial court did not err.

Appellant claims the trial court erred by allowing in evidence statements which he made to the police. Appellant claims the statements were not made voluntarily and were taken after he asserted his right to remain silent.

Miranda safeguards apply only in the case of custodial interrogation. Hughes v. State (1989), Ind., 546 N.E. 2d 1203. Warnings are not required prior to general

on-the-scene questioning related to obtaining facts of the crime. Id. Miranda applies to cases of interrogation, not volunteered statements. Pasco v. State (1990), Ind., 563 N.E.2d 587. Statements which are volunteered are admissible regardless of whether an accused is in custody or whether he has been Mirandized. Robey v. State (1990), Ind., 555 N.E.2d 145.

In Johnson v. State (1979), 269 Ind. 370, 377, 380 N.E.2d 1236, 1240 we stated:

"The term 'interrogation' has been defined as a process of questioning by law enforcement officials which lends itself to obtaining incriminating statements. [Citation omitted.] Not every statement uttered by a police officer which is punctuated with a question mark will necessarily constitute an interrogation

[Citation omitted.] Rather, it is necessary to view the statement in the cons\text in which it was made. If, after having done so, it does not appear that the purpose of the remark was to obtain a confession from the accused, Miranda is not triggered and it is not necessary that the accused first be advised of his rights."

When appellant arrived home from work on the day the victim's body was found, the police already were interviewing Alene Kingery. The police had determined that appellant and Kingery were the last people known to have seen the victim alive. The officers noted the discrepancies between appellant's story and Kingery's later repudiated story. Observation of the tread of the front tire of appellant's car seemed to match the tire marks which appeared in

the victim's body. An officer observed what appeared to be bloodstains on appellant's car. Trooper Lang instructed Morgan County Sheriff's Deputy Betts to Mirandize appellant, which he did. Betts questioned appellant but after a short time appellant asserted his right to remain silent. No further questioning by either officer ensued.

The officers then asked Kingery and her mother to consent to search the premises. The officers had determined that appellant lived with Kingery and her mother in the home which they rented. Appellant insisted that he accompany the officers which they conducted the search. A written consent form was signed by all three individuals and a search of the home was conducted in appellant's presence.

Appellant was not handcuffed as he

rode in the unlocked back seat of the squad car while the officers went to find Kingery's brother, James, to confirm appellant's story. During this trip, appellant provided directions to locations where James Kingery could be found. Testimony adduced at trial showed that when appellant began making substantive statements and asking questions, he was informed that he was not under arrest, but was reminded that he had asserted his right to remain silent.

Appellant then stated that he would talk to the officers because he had nothing to hide. He repeated the same story he had previously told. James Kingery's story did not support appellant's story. Assuming that appellant was in custody from the point in time when the officers determined that there were some serious discrepancies

in the stories told by appellant and Kingery, the officers scrupulously honored appellant's request to remain silent. They did not question appellant. When appellant initiated conversation by asking questions, the officers reminded him that he previously asserted his right to remain silent. There is no evidence in the record which indicates that appellant was in any way coerced or threatened by the officers.

Appellant cites the dissenting opinion in Moore v. State (1986), Ind., 498 N.E.2d 1, to support his position. In Moore, we held that when an accused invokes his right to remain silent the police must "scrupulously honor" that right. The burden in on the State to prove that in fact was done. Unlike Moore, appellant initiated further discussion of a substantive nature with the police. The

officers reminded him of the fact he previously had invoked his right to remain silent. Appellant went on to say that he would talk to them because he had nothing to hide. Therefore, the statement made to the police was voluntary. The trial court did not err.

Appellant contends the trial court erred by refusing to read his Tendered Instruction No. 20. The tendered instruction is as follows:

"It is a complete defense to the crime of Child Molesting (Count V), that the accused person reasonably believed that Jeanie Whitman was sixteen (16) years of age or older at the time of the conduct. The State of Indiana must prove beyond a reasonable doubt that the Defendant did not reasonably believe that Jeanie Whitman was sixteen (16) years of age or older. If you

find that the State of Indiana did not meet it's burden of proof on the offense of Child Molesting (Count V) then you must find the Defendant, Rickey Jenkins, not guilty."

The trial court gave Final Instruction No. 19 which is as follows:

"If you find that the Defendant has raised the issue of the victim's age for Count III and County V by some means, it is a defense that the accused person reasonably believed that the child was sixteen (16) yars (sic) of age or older at the time of the occurrence.

If you find that the Defendant has raised the issue, the State has the burden of disproving this defense beyond a reasonable doubt."

Upon review of an issue concerning the giving or refusal of an instruction, we

consider whether the tendered instruction is a correct statement of the law, whether there is evidence to support the giving of the instruction, and whether the substance of the instruction is covered by other instructions. Reinbold v. State (1990), Ind., 555 N.E.2d 463. The trial court's instruction is a correct statement of the law addressed in the tendered instruction. The trial court's instruction goes on to state that the defense also applied to Count III. The trial court did not err in refusing the tendered instruction.

Appellant contends the trial court erred by allowing Officer Robert Garner to testify as an expert witness in the area of analysis of tire marks left in gravel. Appellant challenges Garner's qualifications as an expert in that field.

We have held that a witness need

demonstrate no precise quantum of knowledge in order to testify as an expert. White v. State (1989), Ind., 547 N.E.2d 831. A showing of sufficient skill, knowledge, or experience in the field is all that is required to allow a trial court to find that a witness' opinion or inference will aid the trier of fact in the search for the truth. Id. The trial court has broad discretion in determining qualifications of an expert witness. Id. We will reverse the trial court's determination only for an abuse of discretion. Id.

Officer Garner testified that there were many gravel roads in Morgan County and that he had processed fifteen homicide crime scenes in seven years. He stated he had done several tests on gravel roads. He further testified there are certain objective factors present which distinguish

acceleration marks from skid marks and stated those factors.

We find no abuse of discretion in allowing Officer Garner to testify as an expert and state his opinions or conclusions. Morgan County Sheriff's Deputy Larry Sanders testified that when he secured the crime scene he observed tire marks which appeared to be the result of a speeding vehicle which fishtailed in the gravel. There was no objection to that testimony. Officer Garner testified regarding the tire marks to which an objection was made and overruled. Two subsequent witnesses testified without objection to the characteristics of the tire marks in the gravel.

When appellant fails to object to allegedly inadmissible evidence the first time it is offered, no error is preserve.

Alexander v. State (1983), 449 N.E.2d 1068. Further, in order to preserve the allegation of error, appellant must object each time the allegedly inadmissible evidence is offered. Bonds v. State (1982), Ind., 436 N.E.2d 295. The appellant did not do so. The trial court did not err.

Appellant claims the trial court erred by refusing to admit a newspaper advertisement into evidence. Appellant argues the advertisement was relevant because it supported his assertion that he reasonably believed the victim was over sixteen years of age. The advertisement was for an R-rated movie "Freddy's Dead".

Kingery testified that the victim and her boyfriend told appellant and Kingery that they were going to Greenwood, Indiana to see the movie "Freddy's Dead." The

boyfriend also testified that the victim wanted to see that movie. Appellant then tried to introduce in evidence the newspaper advertisement.

Appellant argued that it was relevant to support the reasonableness of his belief that the victim was over the age of sixteen which would have been a defense to the child molesting count. The State's objection based on relevancy and hearsay were sustained.

Evidence is relevant and admissible if it tends to prove or disprove a material fact or shed any light on the guilt or innocence of the accused. Davidson v. State (1990), Ind., 558 N.E.2d 1077.

Assuming for the sake of argument that the trial court was in error by refusing to admit the advertisement, appellant has failed to show how he was prejudiced by the

ruling. Witnesses testified that the victim had talked about going to see the movie at Greenwood and that it was an R-rated movie requiring a minimum age of seventeen to be able to view it. Therefore, content of the advertisement and the age requirement were already in evidence through the testimony of those witnesses. The trial court did not err.

Appellant claims the trial court erred by refusing to admit a letter from the Morgan County Prosecutory to the F.B.I. In the letter, the Morgan County Prosecutor expressed his hope that the results of the tests conducted by the F.B.I. would provide a further link between the appellant and the crimes charged.

We have held that in civil litigation, protection must be extended to the attorneys' work product. State ex rel.

Keaton v. Cir. Ct. of Rush Cty. (1985), Ind., 475 N.E.2d 1146. The work product privilege is a qualified one and can be waived. Id. What constitutes a waiver of the privilege depends on the circumstances. Id. We have held that even where documents, e.g. police reports, are produced in a criminal trial context, this does not render them admissible it there is not an explicit or implicit waiver of the privilege. Id.

In the case at bar, the prosecuting attorney did not waive the work product privilege. The letter was inadvertently supplied by the F.B.I. to defense counsel. In the absence of explicit or implicit waiver, the trial court's decision to bar admission of the letter was proper. Further, the trial court suggested, when ruling on the admissability of the letter,

that certain portions of the letter might be admissible, while portions containing the prosecuting attorney's thought processes were not admissible. Appellant had as an option redaction of the letter. Appellant chose not to do so. The trial court did not err.

Appellant contends that the trial court erred when hair samples and test results thereon were allowed in evidence. The trial court had extended the original discovery deadline by one day until March 2, 1992, in order to allow the State to collect the hair sample. The day after the extended deadline the State collected the sample and sent it to the State Police for analysis. The results of the test were made available to the defendant via deposition ten days later. Appellant's objection on the basis that the discovery

date had expired was overruled. The tests showed that the pubic hair found in the victim's underwear was not that of her boyfriend.

One of the strongest presumptions on appeal is that the trial court acted properly. Myers v. Myers (1990), Ind., 560 N.E.2d 39. An abuse of discretion by the trial court occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. Id. Trial courts are vested with broad discretion where discovery is concerned. Hicks v. State (1989), Ind., 544 N.E.2d 500. Absent a clear violation of that broad discretion, and a showing of prejudice, a trial court's decisions will not be disturbed. Armstrong v. State

(1986), 499 N.E.2d 189.

Appellant has failed to show how he was prejudiced by the trial court's decision to allow the evidence. The results were provided to appellant eliminating the element of surprise at trial. Further, the evidence tended to provide further facts for the jury to consider regarding the identity of the person who committed rape and child molesting. We cannot say it was error for the trial court to admit relevant evidence which aided the trier of fact in its determination. The trial court did not err.

Appellant argues the trial court erred by allowing a non-disclosed rebuttal expert witness to testify for the State. In its case-in-chief, the State presented the testimony of Special Agent Robert Coffin

regarding DNA testing procedures and reliability. The defense presented the videotaped deposition of an expert witness, Dr. Libby, to challenge the reliability of DNA testing procedures. The State did not disclose the name of a rebuttal witness, Dr. Edenberg, until 45 minutes before his testimony at trial. Appellant's objection to the expert testimony was overruled.

We have held that the State is under no obligation to provide the defense with a list of its rebuttal witnesses. Smith v. State (1990), Ind., 553 N.E.2d 832. There is no right to discovery of rebuttal witnesses. Thompkins v. State (1978), 270 Ind. 163, 383 N.E.2d 347. Therefore, no reversible error occurs when a trial court declines to order such discovery. Id.

Appellant argues that our recent opinion McCullough v. Archbold Ladder Co.

(1993), Ind., 605 N.E.2d 175, disposes of this issue in his favor. While it is true that we held in McCullough that the nondisclosure of a rebuttal witness is excused only when that witness is unknown and unanticipated, that rule must be applied prospectively. This was not the law at the time the present case was tried. Therefore, the trial court did not err.

We note the trial court has wide discretion in ruling on violations of a discovery order, and we will not reverse the determination absent an abuse of discretion. Martin v. State (1989), Ind., 535 N.E.2d 493. Exclusion of evidence as a discovery abuse sanction is proper only where there is a showing that the State engaged in deliberate or other reprehensible conduct which prohibits the defendant from receiving a fair trial. Id.

There is no evidence in the record not does the appellant argue that the nondisclosure was an intentional act of bad faith on the part of the State. Appellant failed to move for a continuance when he did discover that the expert was going to testify during rebuttal. We have held that failure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order. Id. The trial court did not err.

Appellant claims the evidence is insufficient to support the convictions. On review of a question of sufficiency of the evidence, we will not reweigh the evidence not judge the credibility of the witnesses. Miller v. State (1990), Ind.,

563 N.E.2d 578. We will consider only that evidence which supports the verdicts and all reasonable inferences to be drawn therefrom. Id. The findings made by the trier of fact will not be disturbed where there is substantial evidence of probative value to support the convictions. Id.

The State presented DNA evidence from which the jury could find appellant was the perpetrator of the crime. The semen from the stain on the victim's underwear had the same characteristics as that of the appellant. There was evidence os scratches on his upper thighs at the time of his arrest. There was also testimony which tended to suggest that appellant had expressed a sexual interest in the victim prior to the commission of the crimes. Although appellant present contradictory evidence it was for the trier of fact to

determine which version of the facts to believe. The evidence is sufficient to support the rape conviction.

Appellant also challenges the sufficiency on the murder conviction. There was evidence that appellant was the last person to see the victim alive. Appellant threatened his girlfriend in order to get her to cooperate with the story he told the police. Appellant told the police that James Kingery would corroborate his story; however, Kingery's statements did not support appellant's statement of the events. The bruising pattern on the victim's body resembled the tire tread marks and the tire tread matched that of the appellant's car. The victim's blood matched blood which was found on the underside of appellant's car. Appellant presented his version of the events. At

that point, the jury was free to believe either theory presented. The evidence is sufficient to support the conviction.

The trial court is affirmed.

SHEPARD, C.J.,and DeBRULER, DICKSON, AND SULLIVAN, J.J., concur.

ORDER DENYING RE-HEARING

STATE OF INDIANA INDIANAPOLIS, IN

Clerk of the Supreme Court
Court of Appeals and Tax Court

DWAYNE M. BROWN, CLERK

WILLIAM VAN DER POL JR.
38 N. MAIN ST.
P.O. BOX 1799
MARTINSVILLE, IN 46151

JENKINS, RICKEY -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 3/01/94 APPELLANT'S PETITION FOR RE-HEARING IS HEREBY DENIED WITHOUT OPINION.
ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court, this 1st day of March, 1994.

S/Dwayne M. Brown
Clerk Supreme Court, Court of Appeals and Tax Court

STATE OF INDIANA) MORGAN SUPERIOR COURT
)
COUNTY OF MORGAN) CAUSE #:55D01-9109-CF230

STATE OF INDIANA)
-VS- [FILED FEB 3, 1992]
RICKEY JENKINS)

AMENDED MOTION AND OFFER TO PROVE PURSUANT TO I.C. 35-37-4-4

Comes now the Defendant, Rickey Jenkins, by counsel William Van Der Pol Jr., and for his motion as above entitled states as follows:

1). Defendant intends to introduce evidence of past sexual activities of the victim Jeanie Whitman and witness Charles Mathews.

2). Pursuant to I.C. 35-37-4-4 files his written Motion and Offer to Prove..

3). Specifically Defendant intends to introduce evidence that Jeanie Whitman had

sexual relations with Charles Mathews on Friday, September 14, 1991, and on numerous dates previously.

4). Defendant intends to introduce evidence that the victim habitually engaged in consensual sexual relations with Charles Mathews while either fully, or partially clothed.

5). That such evidence will be introduced to explain the presence of semen in the victim, explanation of the alleged vaginal bruise on the victim, and that the victim's state of disrobement would not be consistent with consensual sexual relations.

6). That such evidence is admissible under I.C. 35-37-4-4 (b) (2).

7). That identity and force are key issues on the charges of rape, child molesting, and both felony murder counts.

8). That the purposes of the Rape Shield Statute would not be violated by the introduction of such evidence in that the victim is now dead.

9). The Rape Shield Statute should not be applied where the victim is now dead.

10). That counsel files herewith his affidavit pursuant to statute.

WHEREFORE, defendant requests this Court to find his Offer of Proof sufficient pursuant to I.C. 35-37-4-4 (c)(2), to set this matter down for hearing, and for all other relief proper in the premises.

Respectfully submitted,

McNutt, Hurt and Blue

/s William Van Der Pol Jr.

STATE OF INDIANA) MORGAN SUPERIOR COURT
)
COUNTY OF MORGAN) CAUSE #:55D01-9109-CF230

STATE OF INDIANA)
VS.) [FILED FEB 6, 1992]
RICKEY JENKINS)

BRIEF IN SUPPORT OF DEFENDANT'S
OFFER TO PROVE PURSUANT TO I.C.35-37-4-4

Comes now the Defendant, Rickey Jenkins, by counsel, William Van Der Pol Jr., and for his brief as above entitled states as follows:

I.
INAPPLICABILITY OF RAPE SHIELD
WHERE VICTIM IS DECEASED

The Rape Shield Statute (I.C.35-37-4-4) generally precludes evidence which would generally be admissible. Counsel is unaware of any Indiana Cases deciding the applicability of the Rape-Shield Statute where the victim is deceased. Application of the Rape-Shield is highly prejudicial to

Defendant in that Defendant wishes to explain other sources of the semen found in the victim, and that victim's state of disrobing might be consistent with consensual sex.

Defendant contends that the Rape Shield Statute has no applicability where the victim is dead. The purpose cited by Indiana Case Law for the Rape Shield Statute is to restrict a general inquiry into the past sex activity of victim and to keep the victims from feeling that they are on trial (see Lewis v. State 440 N.E.2d 125, Razo v. State 431 N.E.2d 550, Thomas v. State 471 N.E.2d 681, Moore v. State 393 N.E.2d 175).

In this case the second part of the reasoning is clearly absent. Without the corresponding reasoning, this Court should not apply a rule which generally precludes

evidence which would be admissible but/for the Statute. In this case, the Statute serves no legitimate purpose. Applying the Statute would violate Defendant's Constitutional Rights and would be an abuse of discretion.

II.
THE PRO-OFFERED EVIDENCE IS ADMISSIBLE UNDER 35-37-4-4 (B)(2)

In this case identity of the perpetrator is in question. The State has charged the Defendant with Rape and Child-Molesting based upon lab testing of semen found in the victim's vagina. Charles Mathews admitted to have had sex with the decedent without a condom within 48 hours of victim's death (see attached Deposition). Defendant should be allowed to present evidence of the same to show other possible sources of the semen.

In addition, the State indents (sic) to

introduce evidence of victim's state of disrobement, partially to show that such state would be inconsistent with consensual sex. Charles Mathews, in his deposition testified that he and the victim frequently engaged in consensual sexual intercourse where she was either fully of partially clothed (see attached Deposition).

35-37-4-4 (b)(2) provides that specific instances of sex activity is admissible where "(2) which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded . . ." (i.e. identity of the perpetrator is at issue). In this case, the proffered evidence goes specifically to such issue and therefore is admissible under this exception.

III.

THE ACCUSED HAS A GENERAL CONSTITUTIONAL RIGHT TO PRESENT RELIABLE, CRUCIAL EVIDENCE

Exclusion of the evidence denies Defendant's rights to confront and cross examine, and to present exculpatory evidence. Since the Supreme Court has ruled DNA testing admissible under Hopkins v. State 579 N.E.2d 1297 (see also article by Susan Burke, Indiana Public Defenders Counsel, Res Geste, December 1991), the Court should grant a wider latitude in rebutting or impeaching such evidence through direct testimony concerning sexual acts as are proffered in this case.

In addition, failure to allow in which evidence limits the Defendant's right to present exculpatory evidence. This right was reaffirmed in Bryd v. State 579 N.E.2d 457 in another context.

Finally since the victim is not alive, Defendant is not afforded the right to confront and cross examine the victim on the events concerning this case, the include her state of appearance. Since this right will not be available to the Defendant, which would have been available even under Rape Shield if decedent were alive, greater latitude should be afforded Defendant in this case.

"The history of the accused's right to present a defense, including the right to introduce evidence, 'is the story of the development of the adversary process and the demise of the inquisitorial method." J. Imwinkelried, Exculpatory Evidence, 407 (1990) (citing to Westen, The Compulsory Process Clause 73 Mich. L. Rev 71, 177 (1974). Additionally, the United States Supreme Court has held that the Fourteenth

Amendment guarantees of Due Process incorporates the Compulsory Process guarantees of the Sixth Amendment. Washington v. Texas, (1967) 388 U.S. 14. In writing for the Court in that decision, Chief Justice Warren further asserted that an accused has a constitutional right to present witnesses to establish a defense, as a part of his compulsory process guarantee. Id. at 19.

The doctrine set forth in Washington, Id., was extended to technically inadmissable hearsay evidence in Chambers v. Mississippi, (1973), 410 U.S. 284, when the Court found that although the proffered evidence sought to be admitted did not fit within the state's hearsay doctrine, the testimony was so reliable and crucial that it's exclusion violated the principles of Washington. Further, it found that the

right precluded trial judges from mechanistically applying evidentiary rules to preclude reliable, and vitally necessary defense evidence. Id.

Although in Washington, supra., the Court relied on the compulsory process clause as a source for the accused's constitutional right to present evidence, the Court has also used the confrontation clause to support that right. In Davis v. Alaska, 415 U.S. 308 (1974), the issue related to evidence of a witness' past juvenile record, something which was considered confidential by state statute. The defendant sought to admit this evidence so show possible bias on the part of the witness. While the court in Davis conceded that the State's interest in maintaining the confidentiality of juvenile proceedings was legitimate and important, on the facts

of the case, the Court concluded that exclusion of the evidence violated the accused's confrontation right, which was paramount, despite the state's lawful interest.

Davis, supra., was reaffirmed by the Court when it decided Olden v. Kentucky, ___ U.S. __, 109 S. Ct. 480 (1988). In Olden, the defense sought to admit evidence supporting its theory that the white complaining witness had fabricated a rape charge against the black defendant to protect her romantic interest with another black man. At trial the evidence had been excluded because of the risk that the jury would improperly reject her testimony because of bias about interracial relationships. The Court found that exclusion of this testimony was constitutional error, citing to Davis,

supra.

All of these case cited balanced the accused's right to present exculpatory evidence against the governmental interests in excluding such evidence. In conducting these balancing tests, however, the Court has rather consistently struck the balance in favor of the accused's constitutional right to present evidence. J. Imwinkelried, supra, at 409 (citing to Clinton, The Right to Present Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 756, 795, 858 (1976). The Constitution of the State of Indiana also provides similar guarantees to the defendant, specifically "to meet the witnesses face to face, and to have compulsory processes for obtaining witnesses in his favor." West's A.I.C. Const. Art 1, Section 13.

IV.
COURTS HAVE INVOKED THE ACCUSED'S CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE TO OVERRIDE THE SPECIFIC EXCLUSIONARY RULE WHICH THE PROSECUTION MAY RELY ON AS THE BASIS FOR BARRING THE DEFENSE TESTIMONY IN THE INSTANT CASE

In this case, the defendant seeks to admit evidence that the complaining witness has been exposed to sexual activity, or conduct constituting the same, in the past. The defendant seeks to admit this evidence to combat any assumptions that the jury may make that, absent any actions of the defendant, a child of her age would not consent to sexual activity.

Defendant acknowledges that Indiana's Rape Shield Law has be held constitutional in general. Lagnour v. State (1978) 268 Ind. 441, 376 N.E.2d 475. In Lagenour, however, the Court conditioned the constitutionality of the exclusion of

evidence on showing that there was no actual impingement upon the defendant's cross examination, and therefore upon his rights to confrontation. Additionally, in Lewis v. State (1983), 453 N.E.2d 50, the court refused to accept defendant's argument in regard to the statute's constitutionality, but noted that the defendant was barred only from making "a general inquiry" into the victim's sexual conduct, on the grounds that there was a legitimate legislative limitation placed on the evidence to "keep the victim from being placed on trial." Id. at 53.

In Woods v. State (1989), Ind. App., 534 N.E.2d 1146, a case involving a charge of child molestation, the court found that the trial court's exclusion of any inquiry into the child's sexual conduct, including those instances of molestation by other on about

the dates specified in the charge, was error. The defendant in that case was attempting to admit this evidence to show that someone other than he had committed the acts complained of, and not for the purpose at issue in the instant case, but the decision in Woods shows that there are factual circumstances when the exclusion of evidence based on the Rap (sic) Shield Law is proper.

The defendant has not been able to find any Indiana cases directly addressing the issue of the accused's constitutional right to present exculpatory evidence which goes to explain the complaining witness' consent to sexual activity, such as the issue raised here. However, in a recent decision in Saylor v. State (1990), Ind. App., 559 N.E.2d 332, the Court of Appeals found that the defendant's constitutional right to

present evidence of possible prior molestation took precedence over the State's interest expressed in its Rape Shield Law where the state submitted medical evidence vaginal penetration and the alleged victim had difficulty with concepts.

Other jurisdictions with similar rape shield exclusionary provisions have ruled on this issue, however. "All the commentators recognize that by restricting the admission of relevant evidence, the Rape Shield Laws collide with the accused's constitutional right to present a defense." J. Imwinkelried, Supra at 222. While the defendant concedes that the courts have not uniformly ruled in the defendant's favor on this issue, there have been several decisions which have upheld the defendants's right to present such

evidence.

In Commonwealth v. Appenzeller, 44 Crim. L. Rep. (BNA) 2161 (Pa. Super. Ct., Nov. 2, 1988), withdrawn Jan. 17, 1989, but see, Commonwealth v. Appenzeller, 46 Crim. L. Rep. (BNA) 1104 (Pa. Super. Ct., en banc, Oct. 16, 1989), the court did find that the accused's confrontation right prevailed over the rape shield proscriptions. The court made its decision by finding that the accused's constitutional right to introduce evidence of the young complainant's sexual activity to dispel any improper inference by the jury about her knowledge of sexual matters, was warranted.

Similarly, in State v. Pulizzano, (1988), 148 Wis. 2d 190, 434 N.W.2d 807, the court utilized Davis, 415 U.S. 308, and accepted the defense argument for admission of this type of evidence, after balancing

the policy supporting the Rape Shield Law against the defendant's need for the evidence. Id., 434 N.W.2d at 812. The court found that the accused should be permitted to conduct "limited inquiry into the prior sexual assault for the purpose of negating the inference that M.D.'s sexual knowledge was gained from the alleged assault by Pulizzano." Id. 434 N.W. 2d at 812, in spite of the proscriptions of a Rape Shield Law which were very similar to those of Indiana.

A New Hampshire court ruled in accord with Wisconsin, in State v. Howard, (1981), 121 N.H. 53, 426 A.2d 457, a case involving statutory rape, when it found that the defendant's confrontation right precluded that judge from automatically barring defense evidence of the sexual knowledge of the complaining witness. In reaching it's

decision, the court noted that average jurors would probably assume that a twelve year old girl was sexually innocent, and therefore it was probable that they would believe that unless the offense charged occurred, she would not have this knowledge. Id.

A similar holding was also made by the court in State v. Jacques, (1989), 558 A.2d 706 (Me. 1989), where the court noted that the Rape Shield Law and the policy underlying it "must be weighed against the defendant's constitutional right of effective cross examination and to present a proper defense". Id. at 707. The court additionally concluded that it was a matter of constitutional right that "[a] defendant. . . must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually that

she could not have fabricated the charge". Id. Furthermore, the court added that "[a] number of jurisdictions have recognized the accused's constitutional right to surmount Rape Shield Law "for the limited purpose of rebutting the jury's natural assumption concerning a child's sexual innocence. . . ". Id.

V.

IN THE INSTANT CASE, THE EVIDENCE IN QUESTION IS RELIABLE AND CRUCIAL AND THEREFORE THE ACCUSED'S RIGHT TO PRESENT THE EVIDENCE OUTWEIGHS THE GOVERNMENT'S INTERESTS UNDERLYING THE RAPE SHIELD LAW

A. The Evidence is reliable.

The evidence which defendant seeks to admit in this case is reliable. The information leading to the bulk of the evidence was furnished in a deposition of Charles Mathews. Such information having been furnished to defendant as part of discovery process. Because the witness

would be available and testifying in court, there would be ample opportunity for him to deny making these statements. Aside from the provisions of the Rape Shield Law, if (sic) appears that there would be no other evidentiary block to the admissibility of the proffered evidence.

B. The Countervailing Government Interests Are Minimal.

The purposes of Indiana's Rape Shield statute is to shield the victims from a general inquiry into their prior sexual conduct, and to keep them from feeling that they are on trial. Thomas v. State (1984) Ind. 471 N.E.2d 681. Defendant concedes that this ia a legitimate and important interest of the State. Considering the facts and purpose for which defendant seeks to admit this evidence in the instant case, however, upon balance, the State's interest

is less pressing than the defendant's.

The defendant is not seeking to admit "lurid details" about the complaining witness' sexual history, or to impugn her character or paint her in a negative light. To the contrary, defendant's only purpose for seeking admission of this evidence is to show other sources of the semen and circumstantial evidence of consent. It seems highly unlikely that the jury would think less of a witness just because she had been previously molested or subject to improper sexual activity in the past. The evidence that defendant seeks to admit is also limited in scope, as well as purpose, and therefore there is little risk that the witness would be subjected to a general inquiry into her prior sexual conduct or feel that she is on trial, especially since she will never be called as a witness, the

main ills which the Rape Shield Law seeks to remedy. See, Thomas, supra.

CONCLUSION

It is therefore clear that in this particular case, the government's interest in excluding this evidence must bow to the defendant's constitutional right to present exculpatory evidence. This is not a case where the defendant is seeking to use a constitutional exclusionary rule to suppress relevant, reliable evidence. To the contrary, the prosecution would be seeking to exclude evidence which goes to show the defendant's innocence.

The defendant is not asking this Court to revolutionize evidence law or to invalidate the Rape Shield Law or even modify it en masse. Rather, the defendant is asking only that the Court make a limited ruling based on the specific facts of this case,

and in line with the cases cited supra, that it would be prejudicial and unconstitutional to apply the Rape Shield Law to bar the particularly reliable, relevant and crucial evidence, which the defendant is seeking to admit.

Respectfully Submitted,

/s William Van Der Pol Jr.

STATE OF INDIANA) MORGAN SUPERIOR COURT
)
COUNTY OF MORGAN) CAUSE #:55D01-9109-CF230

STATE OF INDIANA)
VS)
RICKEY JENKINS)

ENTRY AND ORDER RE:RAPE SHIELD EXCLUSION

The defendant herein having requested the Court to waive the rape shield statute as it would apply to the victim herein. The Court having heard argument and having heard some testimony from the witnesses herein concerning the alleged prior acts of the victim. The Court having requested briefs from the parties and having examined those briefs and the Court having researched the matter itself;

THE COURT FINDS it is in the best interest of justice to allow the defendant to bring out the fact that the victim herein had sexual relations with her boyfriend on the

Friday previous to the date of the alleged murder of the victim herein.

THE COURT NOW grants the defendant's motion and offer to prove pursuant to statute and sets hearing for _____.

DATE: 2-24-92 /s G. THOMAS GRAY, JUDGE

STATE OF INDIANA) MORGAN SUPERIOR COURT
)
COUNTY OF MORGAN) CAUSE #:55D01-9109-CF230

STATE OF INDIANA)
VS)
RICKEY JENKINS)

ADDITIONAL RULING ON RAPE SHIELD

The Court now finds that the Rape Shield specifically applies to dead victims. In this case it applies to the dead victim other than any sexual contact she had on the Friday before her death.

DATE; 2-26-92 /s G. THOMAS GRAY, JUDGE

STATE OF INDIANA) MORGAN SUPERIOR COURT
)
COUNTY OF MORGAN) CAUSE #:55D01-9109-CF230

STATE OF INDIANA)
VS)
RICKEY JENKINS)

DEPOSITION OF CHARLES MATHEWS

. . .

Q. Okay . . it would not be necessary . . extremely unusual for Jeanie to have sex while partially clothed, is that correct?

A. That's correct. That's correct.

Q. Thank you. And you in fact had had sex on numerous occasions with Jeannie while she was partially clothed . . is that correct?

A. Yes.

. . .

(RECORD P. 7950)

STATE OF INDIANA) MORGAN SUPERIOR COURT
)
COUNTY OF MORGAN) CAUSE #:55D01-9109-CF230

STATE OF INDIANA)
VS [FILED FEB 24, 1992]
RICKEY JENKINS)

MOTION TO SUPPRESS DNA TESTING

Comes now the Defendant, Rickey Jenkins, by counsel, William Van Der Pol Jr., and for his Motion as above entitled, states as follows:

1. That on February 18, 1992, counsel deposed F.B.I. Technician Robert Coffin.

2. That Robert Coffin will be the only person called by the State in this case from the F.B.I.

3. That during such deposition, Robert Coffin admitted the following:

a. That of the 15 part protocol, he only does part 15.

b. That he did no "hands on" testing in this case.

c. That all "hands on" testing (i.e. Wet Chemistry) was done by his technician.

d. That as to the first 14 steps, he merely supervises such work, but has no actual knowledge of this particular case.

e. That all samples used in this case were not in his custody prior to delivery to him, nor after he gave such samples to his technician.

4. That based upon the following, counsel submits that such testing is not admissible in the laws of Indiana for the following reasons:

a. Right to confrontation guaranteed the State and Federal Constitution.

b. Right to cross examine guaranteed by

the State and Federal Constitution.

c. No chain of custody.

WHEREFORE, Defendant requests the court to suppress such evidence, and for all other relief proper in the premises.

Respectfully submitted

/s William Van Der Pol Jr.

STATE OF INDIANA) MORGAN SUPERIOR COURT
)
COUNTY OF MORGAN) CAUSE #:55D01-9109-CF230

STATE OF INDIANA)
VS)
RICKEY JENKINS)

ENTRY AND ORDER RE:
DEFENDANT'S MOTION TO SUPPRESS DNA TESTING

The defendant having filed his Motion to Suppress on February 24, 1992, and the Court having heard agrement on the matter on February 26, 1992 and having taken the matter under advisement. Both parties having filed briefs herein;

THE COURT NOW denies the defendant's Motion to Suppress DNA Testing. The Court finds that the issue of the Chain of Custody is a proper issue to be taken up during the trial and that the State has it's opportunity to present Chain of Custody at that time, it is an improper pretrial

motion. The Court on request of the attorneys have reviewed the procedure used by the FBI herein and from what has been presented to the Court and upon request of the attorneys finds that the State con prove a Chain of Custody that excludes any consideration of substantial possibility of tampering with the items up through the actual testing of the items by the FBI Lab herein.

THE COURT FINDS as to the issue of Robert Coffin testifying the Court is persuaded by the State's cases in its brief, the State of Ohio v. Fonenette, the State of Louisiana v. Wright, and the People of the State of Illinois v. Lipscome, that direct the Court to the fact that the FBI or Laboratory persons testifying in those cases were classified as experts and could render an opinion on items that were not

admitted into evidence or that they had not "hands on" tested themselves. The Court is persuaded by those cases sufficiently to deny defendant's motion to suppress the DNA testing herein.

The order in no way precluded the defendant from establishing during the trial herein such elements or lack of elements that the Court could reverse its ruling herein.

DATE MARCH 9, 1992 /s G. THOMAS GRAY

STATE OF INDIANA) MORGAN SUPERIOR COURT
)
COUNTY OF MORGAN) CAUSE #:55D01-9109-CF230

STATE OF INDIANA)
VS)
RICKEY JENKINS)

TRANSCRIPT OF EVIDENCE CONCERNING OBJECTION TO EXHIBITS #126 AND #128

(Reporter's Note: State's Exhibits numbers 128 and 128A now admitted into evidence over the objection of the defendant)

(In inaudible conference between the Court and Attorneys, defendant objected to Exhibits 128 & 128A on same grounds as objection to Exhibits 126 & 126A; that such exhibits were taken after defendant told police that he no longer wished to talk to them and the introduction of these statements violated his right against self-incrimination. If defendant's motion he

incorporates by reference his objections, arguments, and evidence taken on Exhibits 126 and 126A and the previous hearing outside of the presence of the jury.)

(Record p. 10390-10391)

Indiana Code § 35-37-4-4 Sex crimes: Admissibility of Evidence of past sexual conduct; procedure
Sec. 4. (a) In a prosecution for a sex crime as defined in IC 35-42-4:

(1) evidence of the victim's past sexual conduct;

(2) evidence of the past sexual conduct of a witness other than the accused;

(3) opinion evidence of the victim's past sexual conduct;

(4) opinion evidence of the past sexual conduct of a witness other than the accused;

(5) reputation evidence of the victim's past sexual conduct, and;

(6) reputation evidence of the past sexual conduct of a witness other than the accused;

may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

(b) Notwithstanding subsection (a), evidence:

(1) of the victim's or a witness's past sexual conduct with the defendant;

(2) which in a specific instance of

sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded; or

(3) that the victim's pregnancy at the time of trial was not caused by the defendant;

may be introduced if the judge finds, under the procedure provided in subsection (c) of this section, that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(c) If the defendant of the state proposes to offer evidence described in subsection (b) of this section, the following procedure must be followed:

(1) The defendant or the state shall file a written motion not less than ten (10) days before trial stating that it has an offer of proof concerning evidence described in subsection (b) and its relevancy to the case. This motion shall be accompanied by an affidavit in which the offer of proof is stated.

(2) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, and at the hearing allow the questioning of the victim or witness regarding the offer of proof made by the defendant or state.

At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant or the state regarding sexual conduct of the victim or

witness is admissible under subsection (b) of this section, the court shall make an order stating what evidence may be introduced by the defendant or state and the nature of the questions to be permitted. The defendant or the state may then offer evidence under the order of the court.

(d) If new information is discovered within ten (10) days before trial or during the course of the trial that may make evidence described in subsection (b) of this chapter admissible, the judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under this chapter.

(e) This section does not limit the right of either the state of the accused to impeach the credibility by a showing of prior felony convictions.

(f) If:

(1) a defendant files a motion under subsection (c)(1) concerning evidence described in subsection (b)(3); and

(2) the state acknowledges that the victim's pregnancy is not due to the conduct of the defendant;

the court shall instruct the jury that the victim's pregnancy is not due to the conduct of the defendant. However, other evidence concerning the pregnancy may not be admitted, and further reference to the pregnancy may not be made in the presence of the jury.

U. S. CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONSTITUTION AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

U. S. CONSTITUTION AMENDMENT XIV

Section 1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.